86-161

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-161

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BLACK CLOUD BUILDING CORPORATION
Petitioner

v.

ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services
Respondents

Response to Petition for a Writ of Certiorari to the Supreme Court of the Supreme Court of the United States

Barbara Lee Caldwell
Deputy County Attorney
Civil Division, 7th Fl.
201 West Jefferson
Central Courts Building
Phoenix, Arizona 85003

QUESTIONS PRESENTED

I

Whether this Court has jurisdiction to entertain the petition for Writ of Certiorari filed by Isabel Wood because she is not an attorney admitted to practice law, pursuant to Rule 5 of the Rules of Procedure of the Supreme Court.

II

Whether there are any constitutional deprivations involved in the issues set forth by Petitioner Black Cloud Building Corporation.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, Respondent certifies that the following is a complete list of all parties to the proceedings below:

Black Cloud Building Corporation, an Arizona corporation, Petitioner-Plaintiff

Dr. Lloyd F. Novick, Director, Arizona Department of Health Services, Respondent-Defendant

Robert G. Harman, Director, Maricopa County Department of Health Services, Respondent-Defendant

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ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services
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Response to Petition for a Writ of Certiorari to the Supreme Court of the Supreme Court of the United States

The Petitioner Black Cloud Building Corporation has filed a Petition for Writ of Certiorari through Isabel D. Wood, who is the president of Black Cloud Building Corporation. Isabel Wood is not an attorney duly authorized to practice law

in the State of Arizona and is not admitted to practice in the United States Supreme Court to the best of Respondent Harman's information.

In the State of Arizona, lay persons are not permitted to represent others in legal proceedings and corporate officers are barred by statute from representing corporations.

JURISDICTION

It is the position of Respondent Harman that Petitioner has not met the jurisdictional requirements for two reasons. First, Isabel Wood is unable to represent Petitioner and second that 28 U.S.C. 1257(3), permits a Petition of Writ of Certiorari when the validity of a state statute is drawn into question as repugnant to the Constitution of the United States.

Petitioner does not set forth the statute which it challenges as being

unconstitutional but merely cites the First and fourteenth Amendments of the Constitution of the United States as being violated by the Arizona courts.

CONSTITUTIONAL PROVISIONS AT ISSUE

Petitioner has set forth the First Amendment and Fourteenth Amendment as being the constitutional amendments in question in the within case. However that is contrary to 28 U.S.C.A. 1257(3) because that statute provides that a Petition for Writ of Certiorari is proper when the validity of a treaty or statute of the United States or State statute is drawn into question. Certainly Petitioner is not questioning the First and Fourteenth Amendment of the U.S. Constitution but there are no statutes cited by Petitioner that would give this Court jurisdiction to review the opinion of the Supreme Court of the State of Arizona. The obvious

answer to the omission of such statutes is that there has been no constitutional deprivation to the petitioner herein.

STATEMENT OF THE CASE

Petitioner Black Cloud Building Corporation constructed a housing development consisting of 24 condominiums under the name of Village East Condominiums. In addition, a spa was installed for use by the 24 condominium owners. Petitioner Black Cloud Building Corporation took the position that it was a private bathing place as opposed to a semi-public bathing place as classified and regulated by the Maricopa County Health Department.

Petitioner Black Cloud Building Corporation filed a declaratory judgment action in the Superior Court of Maricopa County which was Cause No. C478669 and judgment was rendered for Defendant Maricopa County. Black Cloud Building

Corporation appealed that decision to the Arizona Court of Appeals and the Superior Court ruling was affirmed. A copy of the decision by the Court of Appeals is included in this response in the Appendix.

Petitioner Black Cloud Corporation, while the above described appeal was pending in the Arizona Court of Appeals, filed an additional action in the Superior Court of Maricopa County appealing the decision of an administrative hearing officer relative to the regulation and added an additional party, the State of Arizona.

After dismissal of the action by the Superior Court of Maricopa County, Petitioner Black Cloud again appealed to the Arizona Court of Appeals and was unsuccessful in its endeavor to obtain a reversal. The Petition for Writ of Certiorari of Black Cloud Building Corpor-

ation includes the Memorandum Opinion of the Court of Appeals and Order of the Supreme Court of the State of Arizona relative to this case. Those opinions will not be duplicated herein.

In the opinion of Respondent Harman, there are no constitutional issues in the proceedings herein.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The first and foremost reason for denying the Petition for Writ of Certiorari filed in this Court is the fact that it was filed by Isabel Wood as President of Black Cloud Building Corporation. Rule 5 of the Supreme Court Rules requires admission to the highest court of the State for three years prior to admission to practice in the Supreme Court of the United States. Isabel Wood is not an attorney nor is she admitted to practice

to the Supreme Court of the United States nor the State of arizona wherein this action was commenced.

Arizona has statutes prohibiting the practice of law by officers of a corporation unless they are admitted to practice. In Ramada Inns, Inc. v. Lane and Bird Advertising, Inc., 102 Ariz. 127 426 P.2d 395 (1967) the Supreme Court of the State of Arizona held that:

> Absent statutory authority a corporation cannot practice law even in its own behalf. A corporation cannot appear in court by an officer who is not an attorney and it cannot appear in propria persona. Paradise v. Nowlin, 86 Cal. App. 2 897, 197 P2d 867; Title v. Highland Dairyman's Assoc., 10 Utah 2nd 195 350 P2d 616; Nicholson Supply Co. v. First Federal Savings, Fla. App. 185 S0.2d 438; Niklaus v. Able Construction, 164 Neb. 842, 83 N.W.2d 94.
>
> So in finding the defendant's answer defective because not signed by an attorney the trial court followed the position

taken by the vast majority of jurisdictions."

In addition, Arizona Revised Statute § 32-261(A) provides as follows:

> Except as provided in subsection C and D, no person shall practice law in this state unless he is an active member of the State Bar in good standing as defined in this chapter.

Subsection C provides as follows:

> An officer of a corporation who is not an active member of the State Bar may represent the corporation before a justice court or a police court provided that: (1) The corporation has specifically authorized such officer to represent it before such courts; (2) Such representation is not the officer's primary duty to the corporation but secondary or incidental to other duties relating to the management or operation of the corporation; (3) The corporation was an original party to or a first designee of a conditional sales contract, conveyance, transaction or occurrence which gave rise to the cause of action in such court, and the assignment was not made for collection purposes.

As can be readily ascertained, a corporation is limited as to when it may be represented by an officer by Arizona statute and none of the statutory provisions are applicable herein. Courts have the power to inquire into the capacity of a person attempting to represent a corporation or a person in court. In Haberkorn v. Sears Roebuck & Co., 5 Ariz. App. 397, 427 P2d 378 (1978) the Arizona Court of Appeals held at page 399 that:

> Courts may inquire as to whether a person who appears before it in a representative capacity is admitted to the practice of law.

The restriction as to who may practice law is not an unconstitutional provision. In Wright v. Lane County District Court, 647, F2d 940 (1981) the Ninth Circuit held on page 941 that:

> In an action nearly identical to this one, the Arizona statutes forbidding the unauthorized

> practice of law were sustained by the State Supreme Court in Hackin v. State, 102 Ariz. 218, 427 P2d 910, appeal dismissed, 389 U.S. 143, 88 S.Ct. 325, 19 L.Ed.2d 247 reh. denied, 389 U.S. 1060, 88 S.Ct. 766, 19 L.Ed.2d 866 (1967). The Supreme Court dismissed Hackin's appeal for lack of substantial federal question. (Cites omitted)
>
> * * *
>
> The Oregon Statute is not unconstitutional.

The plaintiff in that case had brought a declaratory judgment challenging the constitutionality of Oregon's statute prohibiting an unauthorized practice of law. As can be ascertained, the Ninth Circuit held that it was not unconstitutional. Such would also be applicable to the Arizona statute which likewise is not unconstitutional and prohibits the practice of law by officers of the corporation as well as the Rules of this Court.

In Leis v. Flynth, 439 U.S. 448, 99 S.Ct. 698 (1979) this Court sustained the

Ohio Court which refused to allow out of state attorneys to represent defendants in a criminal case who were not admitted to practice in Ohio. It was held that the asserted right of an out of state attorney to appear pro hac vice does not fall among those interests protected by the 14th Amendment.

For those reasons this Court should dismiss this action pursuant to Rule 16 of the Rules of the Supreme Court because the case does not present a substantial question, and further that there is no party properly before this Court but instead a person attempting the unauthorized practice of law.

The Court should further deny the Petition for Writ of Certiorari because there are no issues raised by Petitioner that challenges any Arizona Statute. This is a prerequisite under 28 U.S.C.A. 1257(3).

Petitioner has alleged that because it was required to pay attorney's fees for a frivolous action that it is being denied the right to redress a grievance. This is certainly not compatible with the actions of Petitioner herein. Petitioner has filed two actions relative to the same set of circumstances, one while another action was pending in the Arizona Appellate Court. In its second action it added an additional party who was not involved at all in the issues that were the subject matter of the lawsuit. Respondent Harmon was successful in getting the second action dismissed as frivolous and Defendant Novick also was successful in getting the action dismissed.

Arizona Statutes provide for the recovery of attorney's fees in frivolous actions. A.R.S. § 12-341.01(C) provides as follows:

> Reasonable attorney's fees shall be awarded by the Court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith. In making such award, the Court may consider such evidence as it deems appropriate and shall receive this evidence during the trial on the merits of the cause, or separately, regarding the amount of such fees as it deems in the best interest of the litigating parties.

The Court of Appeals clearly stated in its opinion that the statute was enacted to provide compensation to persons or parties who were required to defend meritless claims. The Court held that attorney's fees were warranted not only in the trial court but also in the court of appeals pursuant to Rule 25 of the Appellate Rules. Rule 25 of the Rules of Appellate Procedure provide as follows:

. . .

. . .

Sanctions for delay or other infractions:

> Where the appeal is frivolous or taken solely for the purpose of delay, or where a motion is frivolous or filed solely for the purpose of delay, or where any party has been guilty of an unreasonable infraction of these rules, the appellate court may impose upon the offending attorneys or parties such reasonable penalties or damages (including contempt, withholding or imposing of costs, or imposing of attorneys' fees) as the circumstances of the case and the discouragement of like conduct in the future may require.

The Arizona Court of Appeals was very specific in determining that the appeal was frivolous and awarded attorneys' fees under that rule. That entire opinion is set forth in Petitioner's Petition for Writ of Certiorari and will not be duplicated herein.

In McDonald v. Smith, 105 S.Ct. 2787 (1985) this Court declared that the right to petition the government for redress of

grievances does not necessarily grant freedom from the consequences of those rights.

The Petition for Writ of Certiorari is not properly before this Court because it does not comply with the requisite jurisdictional issues and further the issues presented are not issues which this Court can address based upon the pleadings before the Court.

There are no First or Fourteenth Amendment violations set forth by Petitioner. The fact of the matter is that Petitioner as a construction company chose to violate the building regulations of the State of Arizona and Maricopa County by failing to obtain a permit prior to the installation of a semi-public bathing place. When Black Cloud Building Corporation refused to comply with the regulation, a Cease and Desist Order was

issued by the Maricopa County Health Department prohibiting use of said facility. In O'Bannon v. Town Court Nursing Center, 100 S.Ct. 2467 (1980) this Court said:

> ...We hold that the enforcement by HEW and DPS of their valid regulations did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty or property.

In that case an action was brought by a nursing home against the Department of Health Education and Welfare and the Pennsylvania Department of Public Welfare because the departments had revoked the nursing home's authority to provide elderly residents of the home with nursing care at government expense under Medicare and Medicaid. The theory of the plaintiffs was that they were entitled to an evidentiary hearing on the merits of the revoca-

tion before the payments were discontinued. This Court held that there was no constitutional right to a hearing prior to the revocation of a home's authority to provide care.

Here, as in that case, there is no constitutional deprivation to Petitioner for failure to comply with the Health Code of Maricopa County which requires approval of plans for semi-public bathing places.

In Young v. American Mini Theatres, Inc., 96 S.Ct. 2440 (1976) this Court held that:

> Ordinances of Michigan were not violative of First Amendment Rights or the Equal Protection Clause of the Fourteenth Amendment.

In that case the operation of an "adult" movie theatre filed a Petition for Writ of Certiorari challenging the ordinance prohibiting the operation of an "adult" movie theatre-bookstore within a thousand

feet of any other establishment or five hundred feet of a residential area. The claim was that it violated constitutional rights but this Court held that it did not.

In Contra Costa v. City of Concord, 551 F.Supp. 87 (D.C.Cal. 1980) that court addressed the constitutionality of rules and regulations in relation to an existing ordinance and redevelopment plans of the city. The court stated at page 89 that:

> ...Alleged violations of 'rights' that arise exclusively out of a failure to comply with the procedures provided by city charter, ordinances and regulations do not sustain a federal constitutional claim. State of Missouri ex rel. Gore v. Wochner, 620 F2d 183, 185 (8th Cir., 1980).

Here, as in that case, there are no constitutionally protected rights that have been violated by Maricopa County or the State of Arizona, and certainly there has been no constitutional rights violated

by the Arizona Supreme Court or the Arizona Court of Appeals. The Arizona Statutes and Rules of the Appellate Court provide for the award of attorneys' fees in frivolous matters and having found the case of Black Cloud Building Corporation was without merit, the court then followed the statute in an effort to discourage frivolous actions.

CONCLUSION

For all of the above reasons and cases hereinabove set forth, it is respectfully requested that this Court summarily deny and dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

MARICOPA COUNTY
ATTORNEY'S OFFICE

Barbara Lee Caldwell
Deputy County Attorney

Date: August 22, 1986.

CERTIFICATE OF SERVICE

This is to certify that three copies of this Response to Petition for a Writ of Certiorari have been served on all parties required to be served by mailing same to the following:

Isabel D. Wood, President
Black Cloud Building Corporation
Post Office Box 16146
Phoenix, Arizona 85011

Chip Wagoner
Assistant Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007

Dated this 28 day of August, 1986.

Barbara Lee Caldwell
Deputy County Attorney

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED DEC 10 1985

GLEN D. CLARK, CLERK
By R. Ortegon

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BLACK CLOUD BUILDING CORPORATION, an Arizona corporation,	1 CA-CIV 7427 1 CA-CIV 7375 (Consolidated)
Plaintiff-Appellant,	DEPARTMENT D
v.	O P I N I O N
MARICOPA COUNTY, a political subdivision,	
Defendant-Appellee.	

Appeal from the Superior Court
of Maricopa County

Cause No. C-478669

The Honorable David L. Grounds, Judge

AFFIRMED

David R. Postal, P.C. Phoenix
by David R. Postal
Attorney for Plaintiff-Appellant

Tom Collins, Maricopa County Attorney
by Barbara Lee Caldwell,
Deputy County Attorney
Attorneys for Defendant-Appellee Phoenix

J A C O B S O N, Judge

In this action for declaratory judgment, the appellant, Black Cloud Building Corporation (Black Cloud), challenges the authority of the Maricopa County Department of Health Services (County Health Department) to regulate a spa located within the common area of a condominium complex. The trial court granted summary judgment in favor of the appellee Maricopa County.

The issues which we must determine on appeal are: (1) whether the County Health Department is authorized to define public and semipublic pools and bathing places, and to issue licenses and assess fees; (2) whether a spa located within the

common area of a condominium complex is a semipublic pool or bathing place; and (3) whether regulation of spas by the County Health department violates the City of Phoenix's health ordinances.

The facts material to the resolution of this appeal are not in dispute. Prior to November, 1982, Black Cloud, a licensed general contractor, began constructing a 24-unit condominium development known as Village East Condominiums in Phoenix, Arizona. As part of the project, Black Cloud installed a 7.5' x 7.5' x 3' fiberglass spa in the common area of the development. Black Cloud neither submitted construction plans nor obtained a permit from the County Health Department to operate the spa prior to or after installing it.

The Maricopa County Health Code proscribes the construction of bathing

places without first submitting plans to and receiving the approval thereof from the County Health Department. The code also proscribes the operation of public or semipublic bathing places without a permit issued by the County Health Department. In addition, the Department charges fees for inspecting, licensing and regulating public and semipublic bathing places.

On November 9, 1982, the County Health department notified Black Cloud that the spa at the Village East Condominiums had been constructed illegally because of Black Cloud's failure to obtain the necessary permits and approval, and because the color of the spa did not meet Code specifications.

On January 19, 1983, Black Cloud filed a complaint in Superior Court against Maricopa County, requesting a declaratory judgment and injunctive

relief. In the complaint, Black Cloud sought a judgment declaring the County Health Department regulations void where they conflicted with the regulations of the Arizona Department of Health Services (State Health Department) and that the County Health Department had no statutory authority to charge or collect inspection, testing or licensing fees. Black also requested the court to enjoin County Health Department employees from entering the condominium complex, harassing Black Cloud employees or subcontractors, and posting the spa closed or initiating legal action against Black Cloud because of the spa.

By its judgment, the trial court determined that the County had the necessary statutory authority to regulate the installation and inspection of semipublic swimming pools and to charge fees in

accordance with a fee schedule adopted by the Maricopa County Board of Supervisors. The trial court further concluded that the condominium spa was a semipublic pool subject to regulation by the County Health Department. Black Cloud appeals from that judgment.

On August 9, 1983, the County Health Department issued a cease and desist order directing Black Cloud to cease operating the spa until construction plans were submitted to and approved by the County Health Department. Black Cloud requested and received an administrative hearing with the County Health Department to review the cease and desist order. On November 10, 1983, the County Health Department's hearing officer rendered a written decision concluding that the issues raised by Black Cloud were moot in light of the proceedings in superior

court. Black Cloud then instituted a special action in the superior court challenging the validity of the administrative hearing. Black Cloud has also appealed an adverse judgment in that proceeding. That appeal will not be addressed in this opinion.

STATUTORY AUTHORITY TO DEFINE, ISSUE LICENSES AND ASSESS FEES

Black Cloud first maintains that the County Health Department has no statutory authority to "define" public and semipublic pools and bathing places, or to issue licenses and assess fees. In determining the validity of this position, we start with the proposition that if the legislature gave statutory authority to the State Health Department to regulate a specific activity or to attain specific objectives, like authority is possessed by the County Health Department. State v. Kelsall, 22

Ariz. App. 97, 523 P.2d 1334 (1974).

Under Title 36 of the Arizona Revised Statutes, the State Health Department is charged with regulating health problems that affect the state at large. To accomplish this goal, the legislature has delegated substantive rule-making and enforcement powers, both general and specific, to that Department. Under A.R.S. § 36-136(F), the State Health Director is authorized to "make and amend rules necessary for the proper administration and enforcement of the laws relating to the public health." A.R.S. § 36-136(F) (Supp. 1984). More specifically, A.R.S. § 36-136(G)(14) provides that the State Director:

> shall, by regulation: ... [p]rescribe reasonably necessary measures to prevent pollution of water used in public or semipublic swimming pools and bathing places and to prevent deleterious health conditions at such

> places. The regulations shall prescribe minimum standards for design of pools, for sanitary conditions which shall be maintained at any public or semipublic swimming pool or bathing place, and shall provide for inspection of such premises and for abatement as public nuisances of any premises and facilities which do not comply with the minimum standards.

A.R.S. § 36-136(G)(14) (Supp. 1984).

In addition to enumerating the various powers and duties of the State Health Director, Title 36 also contemplates the involvement of local health boards to regulate health problems on a local level. For example, A.R.S. § 36-136(D) authorizes the State Health Director to delegate any of his or her functions, powers or duties to recognized local health departments. Furthermore, A.R.S. § 36-136(H) authorizes local health boards to adopt regulations as authorized by law within their jurisdiction, provided they

do not conflict with state law, and are equal to or more restrictive than the regulations of the State Director. Pursuant to A.R.S. § 36-136(D), a delegation agreement is in effect between the State Health Director and the Maricopa County Health Department. That agreement specifically delegates the State Health Director's functions, powers and duties regarding the construction and operation of public and semipublic pools to the County Health Department.

While Black Cloud does not challenge the validity of the delegation agreement itself, it argues that the State Health Director has no power to "define" public and semipublic pools and thus such power cannot be delegated to or assumed by Maricopa County. The argument rests on the observation that A.R.S. §367-136(G)(14) only expressly delegates the power to

"prescribe" and not the power to "define" reasonably necessary measures to protect public and semipublic pools. To fortify the argument, Black Cloud points to other subsections of the same statute wherein the legislature specifically delegated both the power to "define" and to "prescribe" certain public health measures.

In light of the overall statutory scheme governing public health regulations in this state, we find nothing significant in the fact that A.R.S. § 36-136(G)(14) omits the phrase "to define" from its provisions. As stated earlier, A.R.S. § 36-136(F) delegates broad and general rule-making authority to the State Health Director. The power granted in that subsection necessarily subsumes the power to "define." Since the State Health Director delegated his powers concerning public and semipublic pools to the County

Health Department, we conclude that the County must also have the power to "define" public and semipublic pools and bathing places.

In challenging the County Health department's power to issue licenses and assess fees, Black Cloud again argues for a narrow reading of our public health statutes. A.R.S. § 36-187(C) provides that:

> [a] county board of health . . . may adopt a schedule of reasonable fees . . . for issuing or renewing licenses or permits or for other services as are authorized by law . . ., provided that:
>
> * * *
>
> 3. Any such fee or schedule shall be approved by the county board of supervisors.

A.R.S. § 36-187(C) (Supp. 1984). Pursuant to this statute, the County Health Department has adopted a fee schedule which covers the issuance of licenses and permits for the operation of

public and semipublic pools and bathing pools.

Black Cloud maintains, however, that the County Health Department is not authorized by law to issue licenses or permits since no statute expressly grants this power. Without the authority to issue licenses, Black Cloud argues that the County Health Department has no power to assess fees either. This argument is without merit. When A.R.S. § 36-187 is read in context with the entire statutory scheme governing public health, we find ample authority to support the County Health Department's licensing and fee collecting functions.

A.R.S. § 136(G)(14) specifically authorizes the prescription of reasonably necessary measures to prevent deleterious health conditions at public and semipublic pools. The regulations are to include

minimum standards for pool design as well as for sanitary conditions at the pools. The statute goes on to provide for the inspection of public and semipublic pools and for abatement of non-complying facilities. A.R.S. § 136(F) grants the authority to make and amend rules necessary for the administration of the public health laws. The language and purpose of these statutes, when read in conjunction with A.R.S. § 36-187, is sufficient, as a matter of law, to support the authority of the County Health Department to issue licenses and assess fees.

SEMIPUBLIC POOLS AND BATHING PLACES

Black Cloud next contends that the spa located at Village East Condominiums is private and therefore not subject to public health regulation. A.R.S. § 136(G)(14) provides only for regulation of public and semipublic pools and bathing

places. We agree that if the spa here does not fall within the definition of "public" or "semipublic", that is, the spa is "private", then the County Health Department lacks authority to regulate its construction or use.

Since the legislature did not define the terms "public" and "semipublic" as used in A.R.S. § 36-136(G)(14), we must interpret these terms in light of the intent of the legislature. In ascertaining such intent, we look to the plain meaning of the words employed, the context in which they are used, the overall subject matter, the effects and consequences of different meanings, and the spirit and purpose of the legislation. Apache East, Inc. v. Wiegand, 119 Ariz. 308, 580 P.2d 769 (App. 1978). In addition, although it is not conclusive, interpretation of a statute by an administrative agency

charged with its implementation is entitled to great weight. Marlar v. State, 136 Ariz. 404, 666 P.2d 504 (App. 1983); McLeod v. Chilton, 132 Ariz. 9, 643 P.2d 712 (App. 1981), cert. denied, 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982).

The Arizona Department of Health Services defines a "public pool" as:

> a swimming pool such as municipal, community, commercial, or cooperative, admission to which may be gained by the general public with or without payment of a fee.

A.C.R.R. R9-8-811(K) (Supp. 1980).

The definition of a "semipublic pool" is:

> a swimming pool on the premises of, or part of, a hotel, motel, trailer court, apartment house, country club, camp or similar establishment where the primary business of the establishment is not the operation of swimming facilities and where admission to the use of the pool is included in the fee, or consideration paid or given for the primary use of the premises.

A.C.R.R. R9-8-811(N) (Supp. 1980).

Finally, a "private pool" is defined as"

> a pool established or maintained on any premise by an individual for his own or his family's use, or for guests of his household.

A.C.R.R. R9-8-811(J) (Supp. 1980).

The definitions of these terms in the regulations of the County Health Department are substantially similar to those quoted above, except that the County expressly includes pools at "condominiums" within the definition of a "semipublic pool."

Black Cloud maintains that regardless of these administrative definitions, the spa at the Village East Condominiums is private because it is privately owned by the individual condominium owners. The argument hinges on the fact that title to the common areas of the complex, including the spa, is held in fee by all of the condominium owners as tenants in common. In other words, Black Cloud contends that

since the owners possess a freehold estate in the spa, it must therefore be private and not subject to public health regulations. Even if title to the spa is held jointly in fee by the condominium owners, we find Black Cloud's argument unpersuasive for in our opinion it is not how title to the spa is held, but rather how the spa is used that determines its public or semi-public characteristic.

It is apparent that A.R.S. § 136(G)(14) is designed to protect a class of users of pools and bathing places --those that come in contact with relative strangers in a water environment. It is pools that are frequently used by many persons with the attendant health hazards, such as the transmission of communicable diseases, toward which such legislation was directed.

The fact that the spa at the Village East Condominiums may be owned in fee by

all the condominium owners does not change the semipublic nature of the communal spa or the legislative intent concerning the need for public health regulation at such places. The spa was installed to accommodate all 24 units of the complex and is not maintained for the use of any single individual or family. Given the nature and extent of the proposed use of the spa, it cannot be considered private in the traditional connotations of that word.

The fee ownership analysis argued by Black Cloud is also undercut by the fact that no individual condominium owner possess an absolute right to use the spa. The recorded Declaration of Horizontal Property Regime and Declaration of covenants, Conditions and Restrictions for the Village East Condominiums states that, appurtenant to each condominium unit, is a non-exclusive right and easement to use

the common elements, including the spa, in common with all other authorized users. This easement is subject to certain rules and restrictions promulgated by the Board of Directors of the Condominium Association. One such restriction is the right of the Board to suspend the use of the recreational facilities from any condominium owner or occupant who fails to pay his or her share of the common expenses. These expenses are used to maintain the common areas including the spa.

As the trial court found, the fact that an owner may be precluded from using the spa brings the spa in question squarely within the administrative definition of a "semipublic" pool. Both the State and County Health Departments define semipublic pools to include pools at establishments where the operation of the pool is secondary to the primary business of the establishment

and where admission to the use of the pool is included in a fee paid for the primary use of the premises. Although we are not bound by this definition of a semipublic pool, we find that it is reasonable and should be applied in this case in light of the spirit and purpose embodied in the underlying statutory authority.

Other jurisdictions have reached similar conclusions. In Lucas v. Hesperia Golf & Country Club, 63 Cal. Rptr. 189, 255 Cal. App. 2d 241 (1967), the California Court upheld the application of public health regulations dealing with lifeguards at pools to a swimming pool owned and operated by a private country club. In that case, the court stressed the fact that a pool may be "public" even though it is not open to the public at large. The nature and extent of the use of the pool, rather than its "private" ownership were

deemed controlling. See also Askew v. Parker, 151 Cal. App. 2d 759, 312 P.2d 342 (1957) (holding that a pool owned by a private religious organization was a "public pool" subject to public health regulation); (Commonwealth v. Apple Valley Racquet Club, 20 Pa. Commw. 325, 342 A.2d 150 (1975) (concluding that a swimming pool owned and operated by a private club for the use of club members and their guests becomes "public" when members of the public at large may be admitted through private invitation); Annot. 87 A.L.R.3d 1032 (1978).

More recently, in Hall Harbor Ass'n, Inc. v. Cape May County, 196 N.J. Super. 533, 483 A.2d 445 (1984), the court was asked to decide whether the state swimming pool Code applied to a condominium association. After reviewing the decisions from other jurisdictions, which virtually all

favor allowing public health regulation of pools at private clubs, hotels and motels, etc., the court concluded that the swimming pool code was applicable to a condominium association.

In reaching its conclusion, the New Jersey court emphasized the remedial intent of the public health regulations. The court also distinguished the condominium pool from strictly private pools because the condominium pool in question was simply not maintained only for the use of an individual family and guests. The condominium pool was available to a large number of users and the public health legislation was precisely intended to cover that situation. Other important factors in reaching the result were the payment of a common fee by the owners for use of the pool, the ability of owners to rent their condominium units for indirect "profit,"

and the fact that condominium ownership does not lessen the dangers which the statute was designed to prevent.

Although these cases from other jurisdictions and the cases cited therein were primarily concerned with large swimming pools and not spas, we nonetheless find the reasoning behind those decisions relevant to this case. Given the underlying reasons for the regulation, we find that the term "semipublic pool or bathing place" as employed in A.R.S. § 136(G)(14) encompasses a spa located within the common area of a 24-unit condominium complex. Any other construction would defeat the intent of the legislature to protect the users of non-private pools and bathing places from the dangers of deleterious health conditions and water pollution.

PHOENIX HEALTH ORDINANCES

Black Cloud's final contention is that regulation of spas by the County Health Department violates the City of Phoenix's health ordinances. The argument relies on certain provisions of a 1957 consolidation agreement pursuant to which the old health departments of the City of Phoenix and Maricopa County were merged or consolidated into the present Maricopa County Health Department. According to Black Cloud, the terms of the 1957 agreement limited the new, consolidated County Health Department to providing environmental sanitation services in Phoenix only as authorized by the 1951 Phoenix City Code. Black Cloud further maintains that the 1951 City Code provides no authorization for regulating water pollution and deleterious health conditions at spas.

We find several flaws in the reasoning advanced by Black Cloud in this argument. To begin with, the 1951 Code has since been repealed and replaced with a new, more comprehensive Code. In addition, the actions of the County Health department which Black Cloud now challenges have been authorized by statute as discussed earlier in this opinion.

Also, the consolidation agreement referred to by Black Cloud states that the County Health Department shall provide "[a] program of environmental sanitation based upon generally accepted programs and standards of sanitation in use in Health Departments throughout the United States." After reviewing the operation of the County Health Department with regard to the regulation of public and semipublic pools and bathing places, we conclude that such operation is a generally accepted

environmental sanitation program in the United States. We need look no further than to our own Arizona Department of Health Services and its regulations affecting public and semipublic pools and bathing places to reach this conclusion. We find no material conflicts between the relevant environmental sanitation programs of the State and County Health Departments.

Finally, the 1951 Phoenix City Code would authorize the actions t issue here because of its broad language relating to public health. That Code vested in the city health officer the power to inspect all water and water supplies used within the city and to perform all things necessary or proper to prevent its contamination. In addition, the city health officer was empowered to force the removal of public health hazards and sources of disease from public and private property at the owner's

or occupant's expense. Therefore, even if the Maricopa County Health Department were limited by the provisions of the 1951 City of Phoenix Code, these provisions are broad enough to support the actions at issue in this lawsuit.

CONCLUSION

In conclusion, we find that the statutory scheme in Arizona governing public health and safety, combined with the delegation agreement between the State and County Health Department, provide sufficient authority to define public and semipublic pools and bathing places, and to issue licenses and assess fees. Furthermore, we conclude that a spa located within the common area of a condominium complex is not a private spa. Instead, it is a semipublic bathing place as that term is used in A.R.S. § 136(G)(14) and the administrative regulations of the

State and County Health Department promulgated pursuant to that statute. Finally, the County Health Department's regulation of spas at condominium complexes violates neither the consolidation contract creating the Department nor the 1951 City of Phoenix Code referenced in that agreement.

Based upon the foregoing, the judgment of the trial court is affirmed.

Eino M. Jacobson, Judge

CONCURRING:

Sarah D. Grant, Presiding Judge

Jack L. Ogg, Judge